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June 7, 1996

MM 97-122

Mr. William F. Caton
Acting Secretary
Federal Communications Commission
Washington, D.C. 20554

Re: **FM Translator Stations**
W276AQ, Fort Lee, NJ and
W232AL, Pomona, NY

Dear Mr. Caton

Submitted herewith on behalf of Universal Broadcasting of New York, Inc. are an original and four copies of a Petition to Deny the application filed by Gerard A. Turro for the assignment of licenses of the above-captioned FM translators.

Very truly yours



Richard A. Helmick

Enclosure

cc w/encl.: Herbert D. Miller, Esq.
Roy J. Stewart, Esq.
Norman Goldstein, Esq.
Stephen Barone
Charles W. Kelley, Esq.



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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

BEFORE THE

Federal Communications Commission

MM 97-122 ✓
W276AQ-960531TW
W232AL-960531TX

In re Application of)
)
GERARD A. TURRO) File Nos.
FM Translator Stations W276AQ, Fort)
Lee, NJ, and W232AL, Pomona, NY)
)
For Assignment of Licenses)

To: Chief, Mass Media Bureau

PETITION TO DENY

Universal Broadcasting of New York, Inc. ("Universal"), licensee of AM Broadcast Station WVNJ, Oakland, New Jersey, through its counsel and pursuant to Section 73.3584 of the Commission's Rules, hereby petitions to deny the above-captioned application of Gerard A. Turro ("Turro"), filed on May 30, 1996, seeking Commission consent for the assignment of the licenses of FM Translator Stations W276AQ, Fort Lee, New Jersey, and W232AL, Pomona, New York, to Stephen M. Gansler, proposed trustee of the Gerard A. Turro Trust. In support of such petition, the following is set forth.

1. **Background.** The above-captioned FM translator stations ostensibly rebroadcast the signal of Station WJUX(FM), 99.7 MHz, Monticello, New York; the licensee of Station WJUX is Monticello Mountaintop Broadcasting, Inc., owned by Wesley R. Weis an associate and former business partner of Turro. Turro provides programming to WJUX pursuant to a network agreement and, thus, there is a current business relationship between Turro and Weis; pursuant to this network agreement, Turro produces all the programming broadcast by WJUX at a studio in Dumont, Bergen

County, New Jersey, which is transmitted by conditioned telephone lines a distance of some 60 miles north to WJUX, a 6 kW ERP Class A FM station licensed to serve Monticello, New York. The WJUX signal is purportedly received off air some 50 miles south of WJUX by FM Translator Station W232AL, Pomona, New York, a 3 watt facility, which, in turn, relays the WJUX signal 20 miles southwest to FM Translator Station W276AQ, a 34.5 watt facility serving Fort Lee and surrounding Bergen County, New Jersey.

2. As the above-captioned FM translator stations serve areas far removed from the protected 1.0 mV/m contour of WJUX, Section 74.1232(e) of the Rules precludes Turro from having any connection or relationship with WJUX; it is for this reason that, by letter dated April 5, 1996, the Commission staff directed Turro, on or before June 4, 1996, to either divest his programming relationship with WJUX or divest the above-captioned translator stations.^{2/} Significantly, the Commission's letter did not address whether the news, weather, PSAs and commercial spots produced by Turro and broadcast by WJUX even serve Monticello or the WJUX service area or whether they are directed at Bergen County, New Jersey, wholly outside the WJUX service area, but within the service area for Universal's WVNJ. In any event, Universal is directly prejudiced by Turro's conduct and violation of the Commission's Rules and has standing to submit the instant petition.

3. Almost 16 months ago, on February 15, 1995, Universal filed a complaint with the Commission alleging illegal operations of the above-captioned translator stations in association with

^{2/} By letter dated June 5, 1996, the Commission staff extended the time for Turro to continue his current programming relationship with WJUX and ownership of the above-captioned FM translators until such time as the Commission has had an opportunity to evaluate the instant assignment application.

Station WJUX; this complaint was filed under a confidentiality request but, nonetheless, Turro was able to obtain access to the complaint. In addition to the relationship between Turro and Wesley R. Weis in contravention of the provisions of Section 74.1232(e) of the Commission's Rules, Universal provided evidence to the Commission staff that FM Translator W276AQ was originating, not rebroadcasting, the WJUX programming in violation of Section 74.1231(b) of the Commission's Rules. It is the contention of Universal that FM Translator W276AQ was not receiving the WJUX programming off air but, rather, programming was being directly fed to the translator from Turro's Dumont, New Jersey studio via either microwave or telephone land line under the guise of off-air reception. Turro, in a July 27, 1995 letter to the Commission staff, has categorically denied that the above-captioned translator stations have ever received the WJUX programming by any other means than off air reception.

4. In view of Turro's categorical denials to the Commission, it would be a very serious matter if these representations were not true. Pursuant to Section 73.1015 of the Commission's Rules, broadcast licensees shall not "in any application, pleading, report or any other statement submitted to the Commission, make any misrepresentation... bearing on any matter within the jurisdiction of the Commission." Program origination by FM translators are generally not permitted except for emergency transmissions and 30 seconds each hour to solicit or acknowledge contributions to defray expenses of operating the translators. Accordingly, a misrepresentation on that issue would raise a basic character qualification issue requiring designation for hearing under Section 309(e) of the Communications Act. In this regard, the Commission noted in its letter of April 5, 1996, ordering Turro to either sever his business relationship with WJUX or divest himself of the above-captioned translator stations, that Turro had twice been denied requests to the

Commission to waive its rules in order to allow him to originate programming over his translator stations.²² Thus, an intent or motive for Turro to deceive the Commission is clearly present.

5. In any event, without regard as to whether the above-captioned translator stations are directly originating rather than rebroadcasting the WJUX programming, such translator stations are indirectly achieving the same result since, as noted above, the non-entertainment programming of WJUX does not serve the WJUX listening area but, rather, is directed to Bergen County, New Jersey, which is wholly beyond the WJUX service area. This scheme is nothing more than a contrivance designed to evade the Commission's Rules and Policies affecting not only FM translator stations, but full power primary stations, such as WJUX, which are licensed to serve specific communities and surrounding service areas pursuant to a frequency allocation plan.

6. **Resolution of Character Issues.** In the face of basic character qualification issues which surround Turro's operation of the above-captioned FM translator stations, such qualification issues must be resolved in Turro's favor before the Commission can permit him to assign the translator licenses. See, e.g., Stockholders of CBS, Inc., 1 CR 1114 (1995); FM Broadcasters of Douglas County, 10 FCC Rcd 10429, 1 CR 772 (1995). Moreover, Section 309 of the Communications Act of 1934, as amended, requires that the Commission find that there are no substantial and material questions of fact and that a grant of the above-captioned application would be consistent with the public interest, convenience and necessity. Turro's attempt to avoid these issues by merely assigning the translator licenses to a "blind" trust would neither resolve those

²² See footnote 2 of Roy Stewart's letter dated April 5, 1996 citing Order, 2 FCC Rcd 6674 (1987), aff'd sub nom. Gerard A. Turro v. FCC, 859 F.2d 1498 (D.C. Cir. 1988) and Amendment of Part 74 of the Commission's Rules Concerning FM Translator Stations, 5 FCC Rcd 7212 (1990) at ¶ 47-48.

character issues nor would it alter the manner in which those translators are currently being operated to indirectly, if not directly, originate programming which is a perversion of the intended purpose of both primary broadcast and translator facilities and per se contrary to the public interest, convenience and necessity.

7. **Proposed Trust is a Sham.** The Commission recognizes that trusts are created to hold broadcast licenses or voting stock in a broadcast licensee for a variety of legitimate and proper personal reasons, such as estate planning and income for dependents, as well as to effect compliance with Commission rules for holdings which would violate those rules if held outright, e.g., to avoid a temporary short-term violation of the attribution or multiple ownership rules or newspaper/broadcast and cable/broadcast cross-interest prohibitions or to indefinitely avoid divestiture of a valuable investment. Attribution of Ownership Interests, 97 FCC2d 997, 1023 (1984), reconsidered in part, 58 RR2d 604 (1985), further reconsidered, 1 FCC Rcd 802 (1986) ("Attribution").

8. Under the Attribution criteria, the ownership interest in trusts of grantors or beneficiaries will not be attributed to them if they are sufficiently insulated so as to prevent their exercise of control or influence over the trustee. The Commission's insulating criteria are set forth in Attribution, 97 FCC 2d at 1023-24 and Section 73.3555, n. 2(e) of the Rules. Essentially, the trustee must be an independent person with no familial, personal or business relationship with the beneficiary or trust grantor and the trust instrument must clearly provide that there will be no communications with the trustee regarding the management or operation of the subject facilities.

9. Because trusts have the potential for abuse, the legitimacy of each trust must be evaluated on a case-by-case basis. Attribution, supra, 97 FCC2d at 1024. It should be self-evident

that a trust grantor cannot use a trust to indirectly achieve that which he cannot do directly. Since FM translators are passive facilities, essentially limited to rebroadcasting the signal of a primary station rather than originating programming, and are attributable but not cognizable under the Commission's ownership rules, it is the function and operation of FM translator stations, rather than their legal control or ownership, which should be the principal focus of the Commission in deciding whether a trust vehicle is appropriate.

10. The proposed trustee, Stephen M. Gansler, is a long-time personal friend of Turro and, for that reason alone, should not be viewed as an independent person. Moreover, as FM translators are essentially passive, non-income-producing facilities, the only control and operational duties to be performed by the trustee are essentially ministerial in nature, e.g. to arrange for periodic maintenance and payment of the transmitter power bill. The trust will be fully funded by Turro (see Schedule A to the Trust Agreement) and, pursuant to Article VII of the trust agreement, Turro may at any time add additional property and funds to the trust to perpetuate its operation. Indeed, Article XIX, Section A of the trust document, specifically provides that the purpose of the trust is to "continue the operation of the translators." The trust makes no provision to compensate the trustee for these ministerial services and, under such circumstances, the arrangement must be viewed as nothing more than an accommodation of Turro. It is a distinction without a difference as to whether Turro or the trustee pays the power bill or arranges for the maintenance of the translators and, under such circumstances, the trust concept must be viewed as a sham to perpetuate the current illegal operations of the translators. The trust arrangement would do nothing to sever the network program relationship between Turro and Station WJUX which enables WJUX to originate programming not intended for its listening area but rather for Fort Lee, New Jersey and surrounding Bergen County,

which is served by Translator Station W276AQ. In other words, the trust will not be used as a mechanism to achieve compliance with the Commission's Rules but, rather, to continue violations of the Commission's Rules and Policies.

11. **Conclusion.** The Commission has had ample time to evaluate the matters raised in Universal's February 15, 1995 complaint against Turro and those matters must now be promptly resolved and a determination made as to whether Turro has the character qualifications to be the licensee of the above-captioned translator facilities. Universal submits that the Commission should deny the above-captioned assignment application as a sham and subterfuge to evade compliance with the Commission's Rules and should forthwith order those translator stations to cease operation and initiate license revocation proceedings against Turro and Weis.

Respectfully submitted

UNIVERSAL BROADCASTING OF NEW YORK, INC.

By: 
Richard A. Helmick

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Its Attorneys

June 7, 1996

CERTIFICATE OF SERVICE

I, Jovana M. Cooke, a secretary in the law firm of Cohn and Marks, hereby certify that I have, this 7th day of June, 1996, sent by U.S. mail, postage prepaid, or by hand delivery, as indicated, the foregoing **PETITION TO DENY** to the following:

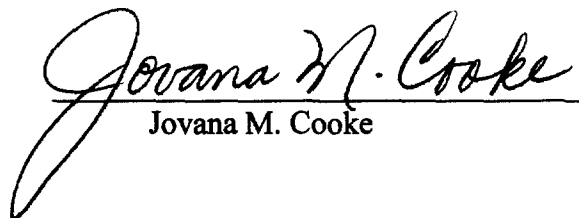
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